No. 9392

In the United States Circuit Court of Appeals

For the Ninth Circuit

R. J. DUDLEY, *Appellant,*

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS, and GEORGE I. HAIGHT, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the Western District of Washington.
Southern Division.

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JURISDICTION

This action is of a civil nature under the provisions of the Federal Employers' Liability Act (35 Stat. 65; 45 U.S.C.A. 51-59) and between citizens of different states. It was commenced by appellant as plaintiff against the appellees as defendants by

filing a complaint and the issuance of summons in the District Court of the United States for the Western District of Washington Southern Division on May 21, 1938 (R. pp. 2-8). Thereafter and on July 20, 1938, defendants filed their answer to plaintiff's complaint (R. pp. 8-14).

The complaint discloses the following jurisdictional facts: (1) that defendants operate a common carrier by railroad in interstate commerce; that plaintiff on October 5, 1936, was in the employ of defendants as a train baggageman engaged in the performance of his duties as such at Tacoma, Washington, arranging space in the baggage car for the reception of express and train baggage matter which was being shipped and transported in interstate commerce from the State of Washington and into and across the State of Idaho to other States of the United States, and through the negligence of the defendants at said time and place plaintiff was injured (R. pp. 2-6); (2) that at the time of the commencement of this action plaintiff was a citizen and resident of the State of Washington and defendants were citizens and residents of the States of Illinois and Wisconsin, respectively, and that there is in the action a controversy which is wholly between citizens of different States which can be fully determined as between them; that the action is of a civil nature and the matter in dispute exceeds the sum of $3000.00 exclusive of interest and costs (R. p. 7), admitted by defendants' answer (R. p. 10).

The District Court of the United States for the Western District of Washington Southern Division had jurisdiction of this cause under the provisions of the Federal Employers' Liability Act, 35 Stat. 65; U. S. Code Ann., Title 45, Sections 51-59 and under the provisions of U. S. Code Ann., Title 28, Section 41.

This Court has jurisdiction to review by appeal the judgment of the District Court under the provisions of U. S. Code Ann., Title 28, Section 225.

STATEMENT OF THE CASE

Appellant in the employ of appellees, operators of an interstate railroad, instituted this action to recover the sum of $3420.00 special damages and general damages of $35000.00 for personal injuries he sustained on October 5, 1936, while engaged in the performance of his duties as train baggageman at Tacoma, Wash. in a certain car of appellees' which was a part of train No. 16, a passenger train destined to Chicago, Illinois. He reported for work about 7:30 P.M. as the train was due to leave Tacoma at 8:00 P.M. Before appellant reported for work appellees had placed in said car a certain smoke jack, property of the Railroad which it was shipping to Spokane, which was constructed of galvanized iron, one end of which was about 4 feet square and attached to this was a smoke stack circular in shape about 8 inches in diameter and 8

feet long, on the top of which was a cross-piece of the same material and dimensions; that the smoke jack was lying lengthwise in the end of the baggage car and had a number of other packages of company material and merchandise underneath it; that circling the stack of the smoke jack were 2 flat galvanized plates which were loose upon the stack and extended out from the surface about 10 inches and that the edges of same were sharp and likely to cut anyone handling the same, which fact the appellees knew but this condition was unknown to the appellant;

That while the appellant in the performance of his duties was arranging space in the baggage car for the reception of other train baggage and express matter, it became necessary for him to raise the smoke jack so that the stack was extending upward in the baggage car and while in the act of moving the packages which had been underneath the same, the smoke jack started to fall and in placing his arm against it to keep it from falling he came in contact with the sharp edge of one of the circular galvanized plates and received a cut on the wrist bone of his left arm which bled profusely and infected his blood so that he sustained a systemic blood poisoning of his entire system resulting in a permanent arthritic condition of his spinal column and his right and left arms and joints of his legs and knees, which prevented him from following his work as a train baggageman up to the present time with the excep-

tion of some work he did between February 26th and May 8th, 1937, as a train baggageman but on account of his physical condition was required to discontinue such work.

The negligence charged against appellees is: (a) appellees failed and neglected to wrap and protect the sharp edges of the galvanized circular plates extending from the stack of the smoke jack by covering them with burlap or other material so that appellant would not come in contact with same, which protection was the custom and practice adopted by appellees; (b) appellees failed to warn appellant of the dangerous and sharp edges of the galvanized plates prior to the time he was required to handle same.

Appellees admit appellant's employment and the existence of the smoke jack in the baggage car and that it fell and cut appellant on the wrist when he came in contact with it, and deny their negligence when appellant was damaged, and allege as defenses that appellant assumed the risk or danger of coming in contact with the sharp edges of the smoke jack, that his standing the same up against the side or end of the baggage car was the sole and proximate cause of his injury and damage, if any, and that he was guilty of sole negligence in moving the smoke jack.

The case was tried before the Court and a jury. At the close of appellant's evidence the trial judge

sustained a motion of appellees to dismiss the action on the ground that the proximate cause of appellant's injury was his act in putting the smoke jack up in a position where it would fall on him (R. pp. 98-99), to which ruling appellant excepted, which was allowed by the Court (R. p. 99), and judgment of dismissal with costs entered (R. pp. 14-15). From this judgment of dismissal appellant brings this appeal.

The undisputed testimony in this case as to how the accident happened was given by appellant (R. pp. 16-63-74), which will be referred to briefly as follows:

Appellant on Oct. 5, 1936, reported for work as train baggageman at the depot in Tacoma about 7:30 P.M. at which time it was dark, and went to the baggage car and started arranging it for receiving baggage. The car was 72 feet long, 42 feet allotted for express and 30 feet for train baggage. There was a door on both sides of the car about 6½ feet wide which slid back and when open was about 9 feet from the end of the door to the end of the car. There were guards on the interior of the car covering the door, consisting of steel metal construction, to protect the baggage from going against the door. The interior of the car was dark aluminum color, steel plate lined and had eight 25 watt lights on the ceiling in the center of the car and one light over each of the four doors. The interior of the car was about 9 feet high.

On getting in to the baggage car appellant found there were piled in front of the doorway some heavy boxes, a few gunny sacks with some kind of material in, a smoke-jack and other company material on the station side. He had to place the baggage car in order to receive some baggage and write the company material up as he had to make a report of it.

With reference to where the smoke-jack was, there were other material which he had to pick up consisting of boxes and material in the door. The door was open and the jack was to the right of the door on the station side near or against the wall on the floor and the sacks were in front of it. The closest end of the jack was about two feet from the doorway. At the foot of the door there were about eight or ten heavy boxes about 3 feet high and 18 inches wide, 2 feet high and a foot wide—of different sizes—that blocked the doorway. Between the doorway and the back end alongside of and under and around the stack part of the jack were about ten small packages, some of which were under the stack part of the jack. Appellant arranged them in the car, first moving the heavy boxes from the front of the car door to the opposite side of the car out of the doorway. He then moved some of the packages around the smoke-jack and placed them in different parts of the car where he knew they would be. Next he raised the jack. There were some packages underneath the smoke-jack which he had to get out. The smoke-jack was about 7 feet long.

There was a loose disk on the stove pipe part. There was a flange probably 19 or 20 inches across on the bottom that was loose just below the disk on the pipe. (Illustrating by an exhibit in court, appellant pointed to the stack, the disk or flange of the stack and the top which is called a "T".) He stated he never handled a smoke-jack before. He had seen them on a building or car. To his recollection none had ever been shipped before. The pipe on the part of the smoke-jack was about 8 inches across and the width extending out from the stack part was about 5 feet 6 inches. The disk he was touching was loose on the pipe and was 10 ~~feet~~ 12 inches from the floor. The edge of the top flange was straight and flat and stuck out and was sharp. He got the dimensions and description of the smoke-jack shortly after he was injured. The stack part of the jack was about 5½ feet long, the jack 7½ feet from top to bottom. The disk of the jack was loose and played up and down on the stack. The bottom disk did not have so much play—about 10 inches. He further testified:

"THE COURT: Just tell what you did with it.

A. There was packages in front of it, and there was packages underneath and around it. I had to move some of those packages, and there was some packages underneath it too. In order to get at the packagges I raised it up this way (indicating).

THE COURT: Did you lean it against the wall?

A. Yes.

Q. You left it there?

A. Yes.

MR. HANLEY: Q. How much time elapsed before it fell on you?

A. Probably half a minute.

Q. What were you doing at the time?

A. I was getting these packages out.

Q. Then what happened?

A. It started to move like that (indicating). I thought it was going to move— I am down on the floor getting the packages out from around it—— I thought it was moving and put out my arm to stop it and it struck me on the wrist.

Q. Which wrist?

A. The left wrist.

Q. Did it cut you?

A. Yes.

Q. What part of it cut you?

A. The disk.

Q. How do you know it was the disk?

A. I saw some blood on it.

Q. Did you notice the disk before?

A. No.

Q. Had you made an inspection before you handled it?

A. No.

Q. Did you know where it was going?

A. No.

Q. How did you find out where it was going?

A. I looked at the tag.

Q. Where was the tag?

A. Tied on the "T" end.

Q. How did you see it was on it?

A. When I raised it up from the floor I saw it and I looked at the tag. I saw the tag up there on the "T" end so I noticed it was going to Spokane."

(R. pp. 33-34.)

At the time appellant reported for work there were other articles besides company material in the

baggage car consisting of laundry bags, linen and company mail bags. Appellant had to sort the mail in the mail bags before the train left Tacoma. There was a truck load of passenger baggage to be loaded in the baggage car on the depot platform consisting of trunks, grips, suit cases, etc., by the station agent and had to be received by appellant before leaving Tacoma. Appellant further testified he did not inspect the smoke-jack before he handled it—he did not have time (R. p. 37). Appellant further testified:

> "Q. When the smoke jack struck your left wrist I think you testified, did it fall clear over?
> A. No.
> Q. What happened to it?
> A. I just kind of straightened it up.
> Q. How big was the cut on your wrist?
> A. It was to the bone.
> Q. Was there any blood?
> A. Yes."
> (R. p. 38.)

Appellant further testified the color of the smoke-jack was galvanized iron the same as the color of the interior of the car, the lighting condition of the car was poor. They were burning but not fully—probably a third capacity. They are lighted when the train is standing from storage battery and when train is running a dynamo underneath the car generates electricity and the lights are brighter (R. p. 39). It is usual for them to be brighter at the station when standing and loading baggage. Sta-

tion lights right by the door give about one-third more light. Appellant saw baggage and smoke-jack—that he stood it up and was not in the dark—knew what the objects were but did not have light enough to read the tag on the jack when he stood it up—he had to raise it up near the lights in order to read the tag as to its destination (R. p. 40).

Appellant stood the smoke-jack up because he wanted it out of the way. He then stooped down to do some other work and in about half a minute it fell toward him—put out his left arm to stop it and it cut him. All this time he was stooping and could see what the objects in front of him was. He thereafter showed his injured arm to conductor Johnson, at which time it was bleeding quite freely. He was thereafter treated by the Company physicians. He returned to work in February, 1937, and worked until about the 10th of May, 1937, and thereafter had to discontinue such work on account of his physical condition.

Appellant further testified that prior to the time he was injured the Company shipped cross-cut saws, axes and adzes in the baggage car. The sharp end of the adze was protected by burlap wrapping. Points would be protected usually with some small light wood over them. The sharp ends would not be exposed under any circumstances. The Company always shipped that kind of tools with protection prior to the time of the accident.

"MR. LAUGHON: I object to that, Your Honor, as immaterial * * *.

THE COURT: I think that entire testimony I will strike out—any testimony in regard to the sharp edges of axes, adzes and saws until you show what kind of an edge it was I will strike that part of the testimony."

Appellant further testified that he first examined the top disk shortly after it cut him. It had some blood on it. It was flat and loose and had a very sharp edge—so sharp he could cut himself if he touched it.

"Q. THE COURT: Take this small pocket knife—this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge?

A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like the knife.

Q. Was there any cover on it at all?

A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

MR. LAUGHON: I object; he answered before I could object, Your Honor.

THE COURT: I am not going to allow any evidence as to instruments except as to this type, etc.

MR. HANLEY: An exception, if the Court please.

Q. Was there any covering of any kind on this disk?

A. No.

Q. Now, had you received any notice from the Milwaukee or any of its agents or employees

of the sharp edge being on this smoke-jack you have just testified about?

A. No."

(R. pp. 51-52.)

Appellant further testified he had not done any physical work since he left the railway and was not able to do any although he tried several times. At the time of the accident he was not wearing gloves. He would not advise a shipper to ship a smoke-jack in the same form—he thought it would be necessary that it be crated (R. p. 74).

Conductor W. S. Johnson testified relative to the interstate commerce in the train and that it was dark when he reported for work at 7:30 P.M.; that he first went to the baggage car after appellant showed him his injury; that he looked at the disk on the smoke-jack after he left Tacoma. He observed it was a raw edge of thin metal. It was loose on the pipe just enough so it could slide up and down; that he had never seen any smoke-jacks shipped in the baggage car before. When he first went in the car, which was after the accident, he didn't recall where the smoke-jack was but afterwards it was lying up out of the way over a pile of laundry so that nobody could accidentally get against it. He didn't observe the light on the baggage car but the same is brighter when the car is moving. The smoke-jack was made of light metal and new. His recollection was the sleeve around it was loose and that it was a rough edge of metal. He

didn't think it was milled out like a knife—it was just a raw edge (R. pp. 63-74).

SPECIFICATION OF ERRORS

I.

Error of the trial court, duly excepted to by appellant, granting appellees' motion to dismiss action and entering judgment thereon, as under the testimony the cause should have been submitted to the jury to determine as questions of fact, for the following reasons: (a) there was evidence of actionable negligence against the appellees that was the proximate cause of the injury to appellant; (b) that appellant did not assume the risk of his injury as a matter of law.

At the close of appellant's testimony the following motion was made by counsel for appellees:

> "MR. LAUGHON: I make a motion to dismiss the action brought by the plaintiff upon the ground, first, that the plaintiff has failed to show actionable negligence against the defendants or any of them that was or could be the proximate cause of the injury to the plaintiff, if any; the motion is based on the further ground, that it appears from the testimony of the plaintiff, uncontroverted in the case and indisputed, that the injury, if any, that the plaintiff received, was due to the risks and dangers incidental to his employment at that time, which were open and apparent, which were known and appreciated by the plaintiff or could have been known at the time of the injury.

Now, I make the motion on the further ground, that under the evidence of this particular case, the plaintiff's acts, what he did with reference to this smoke-jack, was the sole and proximate cause of any injury received.

THE COURT: The defendants' motion to dismiss will be granted and the case will be dismissed."

(R. p. 99.)

"MR. HANLEY: May I automatically be granted an exception under the Court's ruling?

THE COURT: Yes. Call in the jury."

(R. p. 99.)

II.

Error of the trial court in striking and refusing to admit in evidence the following testimony:

"Q. Had the Company, prior to the time you were injured, ever shipped any tools in your baggage car?

A. Yes.

Q. What kind?

A. Cross-cut saws, axes and adzes.

Q. What, if any, protection was placed on the sharp ends of the adzes?

A. They usually had, I think a burlap wrapping around that.

Q. Would the points be protected?

A. Yes.

Q. In what way?

A. They usually had some protection of some small light wood over it.

Q. Did the Company always ship that kind of sharp tools with that protection, all shipments which you had prior to the time of the accident?

A. Yes.

MR. LAUGHON: I object to that, Your Honor, as immaterial; that is not proof of any-

thing in this case. There is no allegation in the complaint alleging this was a sharp-edged tool like a saw or adze. * * *

THE COURT: I think that entire testimony, I will strike out any testimony in regard to the sharp edges of axes, adzes and saws until you show this was as sharp as an axe, adze or saw * * *. (R. pp. 47-48-49.)

THE COURT: Take this small pocket knife; this one is flat as though it had been cut off sharp and you see it shows a sharpening of the edge?

A. Yes.

Q. All right; what kind of edge did the disk have?

A. It had a sharp edge like that knife.

THE COURT: All right; go ahead.

MR. HANLEY: Q. Was there any covering on it at all?

A. No.

Q. Now, I will ask the question, were sharp tools ever shipped in your baggage car?

A. Yes.

MR. LAUGHON: I object; he answered before I could object, Your Honor.

THE COURT: I am not going to allow any evidence as to any instruments except as to this type * * *.

MR. HANLEY: An exception, if the Court please." (R. pp. 51-52.)

ARGUMENT

Actionable Negligence and Proximate Cause

The first specification of error hereinbefore set out (also R. pp. 102-103) is that the Court should not have granted the motion to dismiss as under the testimony the cause should have been submitted to

the jury as a question of fact for the reason (A) there was evidence of actional negligence of appellees that was the proximate cause of appellant's injury; (B) that appellant did not assume the risk of his injury as a matter of law. The same will be discussed in their order:

(A) 1. *There was sufficient evidence of Appellees' negligence to present an issue of fact for determination of the jury.*

The grounds of negligence relied upon by appellant were: (a) appellees failed and neglected to wrap and protect the sharp edges of galvanized circular plates extending from stack of smoke-jack by covering them with burlap or other material; (b) appellees failed to warn appellant of the dangerous and sharp edges of the galvanized plates prior to the time he was required to handle same.

On these grounds of negligence the evidence clearly shows that appellant was working in semi-darkness with lights burning about one-third capacity (R. p. 39) in baggage car; that he had to move the smoke-jack to get other packages from underenath the stack and arrange them in the car so as to receive other on-coming baggage; that he had never handled a smoke-jack before (R. pp. 37-38); that he set it up in the side of the car and it stood there about half a minute (R. p. 33) and while he was stooping over getting other packages it started to fall. He threw his left arm out to stop

it and the disk on the stack struck him on the wrist and cut him. He examined it after he had received first aid (R. p. 49). The disk was flat, had a very sharp edge, was made of corrugated iron. Its edge was as sharp as a knife (R. p. 51).

> "Q. Was there any covering on it at all?
> A. No.
> Q. Was there any covering of any kind on the disk?
> A. No.
> Q. Now, had you received any notice from the Milwaukee or any of its agents or employees of the sharp edge being on the smoke-jack you have testified to?
> A. No." (R. pp. 51-52.)

Appellant further testified he would not advise a private shipper to ship the smoke-jack as it was but thought it would be necessary that it be crated; that all of the material he testified about being in the baggage car was company material (R. p. 74).

The evidence further showed that the interior of the baggage car was a dark aluminum color (R. p. 22) and that the smoke-jack was the regular color of galvanized iron and about the same color as the interior of the baggage car (R. p. 38). This would make it more difficult to see the disk on such jack. The company prior to the time appellant was injured shipped cross-cut saws, axes and adzes in the baggage car. The sharp end of the adzes were protected by burlap wrapping—points were protected with some light wood over them, sharp ends would

not be exposed under any circumstances. The company always shipped that kind of sharp tools with protection prior to the time of the accident (R. pp. 47-48). (Stricken in part by Court (R. 49)).

In support of the foregoing testimony constituting actionable negligence against appellees requiring submission for determination of the jury we cite the following authorities:

Crane vs. Oliver Chilled Plow Works, 280 Fed. 954 (9th Cir.). Action by Crane against Pacific Steamship Company and Oliver Chilled Plow Works to recover damages for personal injuries sustained by plaintiff while in the employ of Steamship Company from a judgment dismissing the action as against the Oliver Chilled Plow Works in that its demurrer to complaint on the ground that it did not state facts sufficient to constitute a cause of action against it was sustained, plaintiff brings error. It is alleged in the complaint that Oliver Chilled Plow Works was shipper of a potato digger on steamship company's vessel "City of Topeka"; that said defendant placed the potato digger on the wharf when the ship was taking on a cargo of miscellaneous freight by ship's appliances; that the potato digger was constructed with knives and other sharp parts which were cocealed from view and were not observable; that in shipping the potato digger said defendant had negligently and carelessly failed to remove the knives and sharp parts or box or cover or shield the same so that they would not have ex-

posed persons engaged in handling the machine to the danger of cutting their hands while carrying the same in the hold of the ship, all of which was well known to said defendant by properly inspecting the machine before shipment, and that plaintiff was not informed of the danger; that while plaintiff was engaged in carrying the potato digger across the floor of the hold of the vessel as he was required to do, the fingers of his left hand became caught in the knives and other sharp parts of the potato digger causing him to lose two of his fingers to his damage, etc. HELD that the complaint stated a cause of action and that the intervention of the failure of the carrier to warn its employees of the danger of handling the machine shipped by the defendant as an independent cause of employee's injury was a matter of defense and that the question of proximate cause of the injury was for the jury. Citing Milwaukee, etc. Ry. Co. vs. Kellogg, 94 U.S. 469; 24 Law Ed. 256. Judgment reversed with directions to District Court to overrule demurrer.

The Richelieu, 27 Fed. (2d) 960, at p. 968. (3) The present situation is governed by the well-established principle that one who delivers goods to a carrier for shipment, whether he be the manufacturer thereof or not, is obligated, if the goods are known to him to be of an inherently dangerous character, or if he, tested by the standard of the average prudent man, ought to have had such knowledge, to warn the carrier of such inherent danger, unless the

carrier itself knew, or might, by the exercise of ordinary care, have known, of the same. The fact that the shipper is also the manufacturer of the goods does not, in and of itself, impose a peculiar and greater obligation upon him, but he is governed by the principle just stated (authorities). This decision was modified in 48 Fed. (2d) 497 but only as to liability of individual parties.

Northern Pacific Railway Company vs. Berven, 73 Fed. (2d) 687 (9th Cir.). Berven, a car repairer in the employ of Railway Company, was injured at the shops of Railway Company at South Tacoma, Wash., by tripping and falling on a platform, and recovered a judgment. Negligence charged that appellant failed to provide a reasonably safe place to work or a safe footing on a platform and permitted the spikes that held a piece of iron flat to the surface to become loose and the end thereof to curl up thus obstructing the platform and footpath, and that appellant failed to warn appellee of the dangerous condition. Appellant denied the negligence and pleaded assumption of risk. The appellee in this case testified he did not see the strip of iron before he fell and had never seen it before. The court in affirming the judgment HELD that the question of negligence was properly submitted to the jury, adopting the rule laid down in the case of N.Y. C. & St. L. R. Co. vs. Boulden, C.C.A. 63 Fed. (2d) 917, 920, which states the rule to be: "Unless the facts be inconsistent with the existence of negligence

and present a situation so plain that intelligent men would draw the same conclusion, that is to say, that appellant was not guilty of negligence, then it must be conceded that the question of appellant's negligence was properly submitted to the jury and that in that event we are bound by the verdict as to the existence of negligence", and further that the question of proximate cause and assumption of risk under the evidence were jury fact questions.

New York C. & S. R. L. R. Co. vs. Boulden, 63 Fed. (2d) 917, Certiorari denied, 77 L. Ed. 1498. Appellee, a conductor, was alighting from a train in daylight on to a cinder platform at Swayzee and his left foot struck a post protruding above the surface estimated by witnesses from one to seven inches, and he was caused to fall and was injured. Negligence assigned was permitting post to protrude above the cinders. Appellee testified that prior to alighting from the train he was looking ahead but did not look down at the platform other than to glance at it as he was stepping off, and after he fell he looked and saw the post and its dimensions; that previously he had known nothing of the post and had never seen it, although in twenty-six years' service he had stoppel at this station platform about fifty times and had gotten off at or in the neighborhood of the post. Other evidence was to the effect that he was on the platform more frequently. Appellee recovered a judgment and the Court in sustaining same HELD:

"We are convinced that the court properly submitted the question of appellant's negligence to the jury. The projection of the post above the cinders was in no respect necessary to the performance of appellant's or appellee's legitimate duties, and we think it cannot be said that intelligent men would at once agree that it was not negligence on appellant's part to permit said post to extend above the surface of the platform at any place where persons upon the trains were accustomed and impliedly invited to alight. It may be conceded, as appellant suggests, that it should not be required to maintain as expensive a platform in a small town as in a large city, but that fact cannot excuse it from liability for maintaining the less expensive platform in a negligent manner. It may reasonably be inferred from the evidence that the condition of the post at the time of the accident was largely caused by rain washing the cinders from around the post through the joint of the girders, and this condition was permitted to remain the same for one year immediately preceding the accident. These facts constitute substantial evidence in support of the verdict that appellant was guilty of negligence."

McGinty vs. Pennsylvania R. R. Co., 6 Fed. 514, was an action for injuries sustained by employee of Coal Company tripping over unattached rails when moving loaded coal cars. Whether railroad, knowing resultant menace to safety of plaintiff, left rails in their dangerous position an unnecessary and unreasonable length of time and whether such act constituted negligence which was the direct and proximate cause of plaintiff's injuries, HELD for jury.

B. & O. R. Co. vs. Fletcher (C.C.A.), 300 Fed. 318. Certiorari denied 69 Law Ed. 468. Plaintiff was working for defendant as a brakeman in defendant's switch yards and while passing a footpath in the performance of his duties stepped on a rusty hoop and fell into some moving cars and his foot was crushed. Negligence charged was failure to maintain a reasonably safe place to work which consisted of obstructing the footpath with the hoop. Plaintiff recovered a judgment. Defendant assigned as error failure of the Court to direct a verdict on the ground there was no evidence of negligence. The Court HELD (p. 320):

> "The rusty condition of the hoop justified a submission to the jury of the question whether or not defendant had actual notice, or in the exercise of due care should have known in sufficient time to remove it, that the hoop was improperly there and whether or not because of its presence, the place was reasonably safe for its employees * * *. The Court properly denied defendant's motion for a directed verdict." Judgment affirmed.

Cincinnati N. O. & T. P. Ry. Co. vs. Davis, 293 Fed. 481. Plaintiff, a brakeman, was injured while in the employ of defendant. Negligence charged was (1) throwing and distributing cross-ties promiscuously along the track and in such near proximity thereto as to menace the safety of plaintiff in the discharge of his duty, and (2) failing to instruct plaintiff on his duty of how to make a switch. Upon trial there was a judgment for plaintiff. Defend-

ant claimed error on failure of the trial court to direct a verdict on the ground there was no negligence shown. The Court HELD, p. 484:

> "Under the facts and circumstances disclosed by the evidence the Court did not err in submitting to the jury the question of negligence on the part of the Railway Company in distributing these ties along its track or so near thereto as to increase the hazard of employees." Judgment affirmed.

Lancaster vs. Fitch (Tex. App.), 239 S.W. 256, 246 S.W. 1015. Certiorari denied, 67 L. Ed. 1216. Plaintiff brought action to recover damages for loss of his right leg crushed by movement of train while in discharge of his duties as a brakeman, in between two cars while attempting to uncouple them. It appeared that while thus employed plaintiff's shoe was caught on a spike that stuck up or protruded above the surface of the ties and plaintiff was thereby prevented from getting entirely out between the cars after the train began to move and was knocked down, the wheels of the car running over his leg. The Court HELD question of negligence of defendant in having the spike protruding above the ties was for the jury. Judgment for plaintiff affirmed.

Chicago, M. & St. P. R. vs. Coogan, 271 U.S. 472; 70 L. Ed. 1041, 1044, the Court held that a strip of pipe 15 feet in length which had been loosened and bent 3 or 4 inches toward the rail and upward, leaving a space four inches between it and the ties, was

clearly a breach of defendant's duty constituting negligence, but that there was no evidence that deceased caught his foot in same and for this reason the judgment was reversed.

(A) 2. Proximate cause of an injury is ordinarily a question of fact for the jury to be determined in view of the circumstances of fact attending it. It is not a question of science or legal knowledge.

Mlwaukee & St. P. Ry. Co. vs. Kellogg, 94 U.S. 469; 24 Law Ed. 256. Mr. Justice Strong delivering the opinion of the Court on proximate cause, said (94 U.S. on p. 474; 24 Law Ed. 259):

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. Scott v. Shepherd (Squib case), 2 W. Bl. 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the force constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in

> order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Davis vs. Wolf, 263 U.S. 239; 68 Law Ed. 284. In freight conductor's action for injuries sustained when thrown from car by a sudden, violent jerk while standing on sill step holding to a grab iron, question of whether the defective condition of the grab iron was the proximate cause of the accident was for the jury where there was evidence tending to show that the grab iron was defective.

Baltimore & O. R. Co. vs. Tittle, 4 Fed. (2d) 818. Certiorari denied 70 Law Ed. 410. In an action for injuries to switchman sustained when knuckle of coupler fell on switchman after he had pulled out knuckle pin to loosen knuckle, whether the defective knuckle or switchman's negligence in removal of pin with knowledge of defect was proximate cause of injury HELD question for the jury.

Hines vs. Smith, 275 Fed. 766. In an action for death of a fireman struck by a locomotive while operating switches at the round-house whether defective automatic bell ringer was proximate cause of injury HELD for the jury.

Erie R. R. Co. vs. Schleenbaker, 257 Fed. 667. Certiorari denied, 63 Law Ed. 1197. In an action

by a conductor injured when he missed the grab iron on the caboose from which the rear lights had been removed, and fell under the following car on which the caboose lights had been placed and which was the rear of the train, because it had no draw bar or coupler at its rear end, such hauling of the crippled car being unlawful and constituting negligence, question of whether the transportation of the defective car was the proximate cause of the conductor's injury HELD for the jury.

Erie R. R. Co. vs. White, 187 Fed. 556. In an action against railroad company for the death of an employee who was killed while negligently walking between cars in a moving train by having his foot caught because of the defective blocking of a guard rail, the question whether the proximate cause of the injury was the negligence of deceased in walking between the cars or the defective blocking HELD properly submitted to the jury under the evidence.

Donegan vs. Baltimore, etc. O. R. Co., 165 Fed. 869. Plaintiff, a brakeman on freight train, was directed to cut off two rear cars while train was moving slowly and before it reached a certain switch. The automatic coupler on one of the cars was broken and plaintiff went between the cars and attempted to pull the pin by hand, but not succeeding, started out, when his foot caught in an unblocked switch frog and he was injured. In an action to recover for the injury it was HELD that the question whether the failure of defendant to

have the car properly equipped was the proximate cause of the injury so as to render it liable therefor, was, under the evidence, one of fact for the jury and that it was error for the Court to direct a verdict for defendant.

Roberts Fed. Liability of Carriers, Vol. 2, Sec. 876, states the following rule:

> "Where * * * there is any evidence * * * in actions under the Federal Employers' Liability Act tending to raise an issue of fact as to the casual relation between the injuries sued upon, and the want of care upon either party, the question is for the jury",

citing Minn., St. P. & Soux St. Marie v. Groneau, 269 U.S. 406; 70 L. Ed. 335; Louisville & N. R. Co. v. Layton, 243 U.S. 617, 61 L. Ed. 931; Dahlen v. Hines, 275 Fed. 817.

(A) 3. If the occurrence of the intervening cause might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause (proximate cause) and the injury.

The above general rule is laid down in 45 C. J. p. 934.

Crane vs. Oliver Chilled Plow Works, 280 Fed. 954 (9th Cir.) supra, HELD in passing on the sufficiency of the complaint that the negligence of a shipper in delivering for shipment a machine on

which there were concealed knives not guarded to protect those who handled the machine, without warning to the carrier of the character of the shipment, was the proximate cause of the injury to an employee of the carrier while handling the shipment, and that the intervention of a failure of the carrier to warn its employees of the danger of handling the machine shipped by defendant as an independent cause of the employee's injury while handling the machine was a matter of defense.

Carroll vs. Central Counties Gas Co., 273 Pac. 875 (Cal.). In an action for damages for death of occupant of automobile which, when driven off bridge, fell upon gas pipe causing it to break and gas therein to be allegedly thrown upon occupants of automobile, instruction wherein trial court delivered as a matter of law that the act of the driver of the automobile was the intervening act of a third party HELD erroneous as invading the province of jury and to require a reversal where evidence was conflicting.

Pool vs. Tilford, 99 Ore. 585; 195 Pac. 1114. In an action by an elevator man who in the dark fell down an elevator shaft, the car having been moved in his absence, the question of whether the master's negligence in failing to put a head lock on the door so as to prevent unauthorized persons from reaching the elevator and moving it was the proximate cause of injury HELD one for the jury.

Teasdale vs. Beacon Oil Co., Inc., 164 N.E. 612 (Mass.). Whether negligence of a filling station attendant in jerking handle of gas pump causing gasoline to spill over the automobile and clothes of occupant was the proximate cause of burning of occupant after driver of car negligently cranked it with coil box uncovered leaving spark exposed HELD question for jury in action for injuries as intervening act of third person which contributes condition necessary to injurious effect of original negligence will not excuse first wrongdoer if such intervening act could have been foreseen.

Referring to the Court's decision (R. pp. 94-99), the Court speculates on p. 96 stating that "many causes might have intervened to cause the smoke-jack to fall; it might have been that he pulled something from in back of it or placed something right under the stack, or that it may have been he placed it insecurely against the wall; in other words, we have one of three or four causes that might have caused it".

A review of the testimony we think will convince this Court that there is no evidence on any of these theories of the trial judge except that appellant's standing the smoke-jack up, if he did so insecurely, would have been a question for the jury as to whether or not in so doing he was guilty of contributory negligence, which under the Federal Employers' Liability Act, only goes to the mitigation

of damages if it proximately contributed to appellant's injury due to negligence of appellees. (Sec. 3, Federal Employers' Liability Act, 35 Stat. 65; 45 U. S. C. A. 51-59). See also Roberts Federal Liability of Carriers, Vol. 2, pars. 849-868).

The Court further stated in its opinion (R. p. 97): "And there is no cause that is traceable to the employer, but, even if we assume that the presence of this sharp instrument may have been the cause, we have several other causes and, under the authorities of these two cases, a jury would have to speculate as to which cause was the proximate cause of the injury, but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of plaintiff's wrist with the smoke-jack and that occurred after the plaintiff had placed it in a position, and the only position in which it could fall and hurt him, that that was the proximate cause of the injury".

It will be noted from this reasoning of the trial judge that he entirely disregarded the grounds of negligence as alleged in plaintiff's complaint, namely, the exposure of the sharp edges of the disks without protecting them, and failure to warn appellant of their danger, and the evidence hereinbefore quoted which clearly sustains by substantial proof such grounds of negligence.

The Court further in its reasoning above quoted after stating three or four presumptive causes, de-

cides as a matter of the law the question of proximate cause.

A review of the foregoing testimony and the decisions hereinbefore cited, a majority of which were actions under the Federal Employers' Liability law, we feel should convince this Court that there was sufficient evidence of actionable negligence in the case at bar and that such evidence was the proximate cause of appellant's injury, to have submitted such questions to the jury. We do not believe that in the state of the record in this case that the Court can say that reasonable minds would not differ on the testimony and the inferences to be drawn therefrom.

ASSUMPTION OF RISK

(B) *Appellant did not assume the risk of his injury as a matter of law.*

The Federal courts have uniformly held that an employee does not assume the risks arising from the negligent acts of his employer of which he has no knowledge unless the employer's failure of duty and the danger arising therefrom is so plainly observable that he may have been presumed to have known of and appreciated the same. The burden of proof of assumption of risk is on the employer and where the facts are in dispute or are such that reasonable minds would differ thereon, the question of assumption of risk is for the jury.

Chicago, R. I. P. R. Co. vs. Ward, 64 Law Ed. 430.

Renn vs. Seaboard A. L. R. Co., 60 Law Ed. 1006.

Chesapeake & O. R. Co. vs. DeAtley, 60 Law Ed. 1016.

Kanawha & M. R. Co. vs. Kerse, Adm., 60 Law Ed. 448.

Gilla Valley G. & N. R. Co. vs. Hall, 58 Law Ed. 521.

Tex. & Pac. Ry. Co. vs. Harvey, 57 Law Ed. 852.

Northwestern Pac. R. Co. vs. Fiedler, 52 Fed. (2d) 400.

N. Y. Central vs. Boulden, 63 Fed. (2d) 917. Certiorari denied 77 L. Ed. 1498.

Northern Pac. Ry. vs. Berven, 73 Fed. (2d) 685 (9th Cir.).

C. N. O. & T. P. Ry. Co. vs. Thompson (C.C. A.), 236 Fed. 1

Grey vs Davis (C.C.A.), 294 Fed. 57.

Lancaster vs. Fitch (Tex.), 239 S.W. 265; 246 S.W. 1015. Certiorari denied, 67 Law Ed. 1216.

The rule of law on assumption of risk which is laid down in all of the foregoing authorities is well stated in Chicago R. I. P. R. Co. vs. Ward (64 Law Ed. 430), which was an action under the Federal Employers' Liability Act wherein an error was claimed on account of the failure of the court to direct a verdict on the ground that plaintiff assumed the risk. The court stated as follows:

"As to the nature of the risk assumed by an employee in actions brought under the Employers'

> Liability Act, we took occasion to say in Chesapeake & O. R. Co. vs. DeAtley, 241 U.S. 310, 315; 60 L. Ed. 1016, 1020, 36 Sup. Ct. Rep. 564: 'According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them'."

It was further held that under the facts assumption of risk was a question of fact for the jury. The above rule has been adhered to and applied in all of the cases cited.

Renn vs. Seaboard A. L. R. Co., 86 S.E. 964; 60 L. Ed. 1006. Plaintiff sought damages for personal injuries against defendant. Negligence charged was that defendant negligently caused, permitted and allowed water to be poured or spilled upon a footpath and freeze, causing ice to be formed which became covered with snow, and negligently allowed it to remain thereon, causing a dangerous condition, and negligently failed to warn plaintiff of same. Plaintiff while using the footpath slipped thereon and was injured and recovered a judgment. Error was assigned on failure to grant a non-suit on the ground that there was no evidence of actionable negligence and that the evidence conclusively

established assumption of risk. Judgment affirmed. In reviewing the case the U. S. Supreme Court, speaking through Justice Van Devanter, said:

> "Error is assigned upon a refusal to instruct the jury, as a matter of law, that there was no evidence of actionable negligence on the part of the defendant, and that the evidence conclusively established an assumption by the plaintiff of the risk resulting in his injury. Both courts, trial and appellate, held against the defendant upon these points. They involve an appreciation of all the evidence and the inferences which admissibly might be drawn therefrom; and it suffices to say that we find no such clear or certain error as would justify disturbing the concurring conclusions of the two courts upon these questions. Great Northern R. Co. vs. Knapp, 240 U. S. 464; ante, 745, 36 S. Ct. Rep. 399; Baugham v. N. P., P. & N. Co., decided this day (241 U.S. 237, ante, 977, 36 C. T. Rep. 592)."

N. Y. Central vs. Boulden, 63 Fed. (2d) 917. Certiorari denied, 77 L. Ed. 1498. Appellee, a conductor, was alighting from a train in daylight on to a cinder platform at Swayzee and his left foot struck a post protruding above the surface estimated by witnesses from 1 to 7 inches, and he was caused to fall and was injured. Negligence assigned was permitting post to protrude above the cinders. In passing on the question of assumption of risk the Court held:

> "The existence of the condition in which the post was found at the time of the accident certainly was not necessary to the performance of appellee's duties and if he is to be held as having

> assumed the risk pertaining to it, it must be by reason of the fact that he had knowledge of its presence or by the exercise of reasonable diligence could have discovered it. * * * In approaching the station appellee was charged with knowledge of what he saw or could have seen had he looked. The law did not require him to look in any particular direction at any particular time, nor to keep his eyes riveted on any particular spot, but he was required to observe all places where danger was likely to be, and in doing this he was bound to exercise that care which an ordinarily prudent person would have exercised under all of the circumstances. * * * Whether under all of the circumstances the protruding post constituted a risk normally incident to appellee's employment is a question concerning which we feel quite sure that intelligent men might disagree and it was properly submitted to the jury."

Northern Pacific Railway Co. vs. Berven, 73 Fed. (2d) 685 (9th Cir.). Berven, a car repairer in the employ of Railway Company, was injured at the shops of Railway Company at South Tacoma, Washington, by tripping and falling on a platform, and recovered a judgment. Negligence charged that appellant failed to provide a reasonably safe place to work or a safe footing on its platform and permitted the spikes that held a piece of iron flat to the surface to become loose and the ends thereof to curl up thus obstructing the platform and footpath, and that appellant failed to warn appellee of the dangerous condition. Appellant denied negligence and pleaded assumption of risk. In passing on the question of assumption of risk the Court

HELD quoting from opinion page 689:

"The crossing where the accident occurred was used by many persons daily, and there is testimony that the piece of iron over which appellee tripped and fell has been protruding in the manner described for several weeks. However, appellee testified that he had not used the crossing for a couple of weeks before that day because he had had no occasion to go to the material shed for lumber. So far as the record discloses, his work was confined to the wheelhouse, and he was not required to move wheels from place to place. He testified that he 'never rolled any wheels'. He did not use the crossing when going to the material shed that day, but returned on it because it was easier to do so with the lumber he was then carrying. He admitted that the piece of iron was in plain view, but said that he did not notice it before he fell and had never seen it before. He knew that wide strips of iron are used on the platform to facilitate the rolling of the wheels thereon, and that the weight of the wheels and the rotten condition of the wood in the platforms cause the iron strips to curl up at the ends, but said that he had never seen small (narrow) strips like the one over which he tripped.

"Under these circumstances, it seems to us that the question of assumption of risk, that is, whether the piece of iron over which appellee tripped and fell constituted a risk normally incident to his employment, or an obvious condition which he should have observed, was a question upon which intelligent men might disagree, and, accordingly, it presented a question of fact for the jury to determine. The court did not err, therefore, in submitting the question to the jury.

"We find no reversible error in the record, and the judgment is therefore affirmed."

Cincinnati N. O. & T. P. Ry. vs. Thompson (C.C. A.), 236 Fed. 1, was an action under the Federal Employers' Liability Act by plaintiff, a brakeman injured while alighting from a moving train by stepping on a large piece of slag. Error was assigned by defendant on refusal of the court to direct a verdict for it on the ground that plaintiff assumed the risk. The court, in passing on the case, held that although plaintiff knew there were small pieces of slag on the roadbed, that he did not as a matter of law assume the risk of injury when he stepped on a larger piece of slag for the danger therefrom was substantially greater than from the smaller pieces and that the doctrine of assumption of risk necessitated a knowledge of the conditions which can be gained by observation, and the fact that plaintiff knew there were smaller pieces of slag thereon, it could not be inferred therefrom that he had knowledge of the larger pieces of slag, and that the case under the evidence presented a question of fact for the jury as to whether or not plaintiff assumed the risk. *It was further held that the fact that he might have seen the slag before he alighted from the train did not put into operation the doctrine of assumption of risk but effected the issue of contributory negligence only.*

Lancaster vs. Fitch, 239 S.W. 265, 246 S.W. 1015. Certiorari denied, 67 Law Ed. 1216, was an action under the Federal Employers' Liability Act by plaintiff to recover damages for loss of right leg which

was crushed by movement of the train while he was in the discharge of his duties as a brakeman between two cars attempting to uncouple them. It appeared that while he was thus employed his shoe caught on a spike that stuck up or protruded above the surface of the ties and that he was prevented from getting entirely out from between the cars after the train began to move and was knocked down, the wheels of the car running over his leg. It was held that the question of defendant's negligence in having the spike protruding above the ties as well as the question of plaintiff's assumption of risk of injury was for the jury and judgment for plaintiff was affirmed.

We call the question of assumption of risk to the Court's attention because it was one of appellees' grounds for dismissal of this cause that was not passed upon by trial judge. In the case at bar appellant could not assume the risk of injury as a matter of law as the undisputed testimony is to the effect that he did not know of the dangerous condition and sharp edges of the disk on the smoke-jack and had not been warned thereof prior to his injury. The fact that he did not see the sharp edges of the disk on the smoke-jack before the same struck him we think should be directed to the partial defense of contributory negligence as pointed out in Cincinnati, etc. vs. Thompson, *supra,* but should the doctrine of assumption of risk apply, the most that could be claimed for it is that it was a question of

fact for the jury.

As stated in New York Central vs. Boulden, *supra,* the law does not require appellee to look in any particular direction at any particular time nor keep his eyes riveted on any particular spot, but he is required to exercise care of an ordinary prudent person to discover danger. This same doctrine was applied in the case of Northern Pacific Railway Co. vs. Berven, *supra,* by this Court.

Under the facts in the instant case in keeping with the foregoing decisions we submit that the appellant did not assume the risk of injury as a matter of law and that the questions on assumption of risk, if any were involved, were wholly questions of fact for the determination of the jury.

STRIKING AND REFUSING TO ADMIT TESTIMONY

In the second specification of error set out in this brief page 15 (also R. pp. 103-104), it is appellant's position that this testimony relative to the protection afforded by the Company on sharp tools which had been theretofore shipped was clearly admissible and should not have been stricken out by the Court.

ARGUMENT

Appellant pleaded in his complaint the following ground of negligence: "(a) defendants carelessly and negligently failed and neglected to wrap and protect the aforesaid sharp edges of said galvanized circular plates extending from the stack of said smoke-jack by covering the same with burlap or other material so that plaintiff and defendants' other employees handling said smoke-jack would not come in contact with said sharp edges thereof, *which wrapping of said sharp edges of said circular plates on smoke-jacks when shipping or about to ship same was the custom and practice adopted by and known to defendants*".

It is appellant's position that this pleading is broad enough to admit the testimony regarding cross-cut saws, axes and adzes and that they were protected on the sharp ends of the adzes by wrapping them with burlap and that the saw points were protected with some light wood over them. Appellant testified that sharp tools of that nature when same were being shipped prior to the time of his accident always had such protection. (R. pp. 47-48-49.)

It is the general rule as stated in 45 C. J. p. 1241, Par. 803:

> "As a general rule evidence of the custom, usage and practice, if any, generally followed without accident or injury by others in the same situation or occupation as to the doing of a particu-

lar act or the use of a particular agency or method is competent on the question of whether or not a person whose negligence is an issue in an action to recover damages was in the exercise of due care in doing such act or employing such agency or method, or in the failure to do so provided such general custom or usage is so related in time and circumstances to the act or omission in question as to throw light thereon * * *". Citing in Note No. 6 numerous authorities of Federal and State Courts.

Appellant therefore urges under the general rule that testimony given as hereinbefore set out should not have been stricken by the Court and the further offer of the same proof should have been admitted.

CONCLUSION

We submit that prejudicial error was committed by the trial court in dismissing the within cause and on striking testimony and rejecting it, and that the judgment should be reversed and the case remanded for re-trial.

Respectfully submitted,

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